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In the Supreme Court of the United States

OCTOBER TERM, 1979

RSR CORPORATION, PETITIONER

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 171a-189a) is reported at 602 F. 2d 1317.[1] The opinion and order of the Federal Trade Commission (Pet. App. 118a-170a) and the initial decision of the administrative law judge (Pet. App. 1a-117a) are reported at 88 F.T.C. 800.

JURISDICTION

The judgment of the court of appeals was entered on January 8, 1979. A petition for rehearing was denied on July 30, 1979. On October 18, 1979, Mr. Justice Rehnquist extended the time in which to file a petition

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[1]That opinion superseded an earlier opinion of the court dated January 8, 1979, which is reported in 1979-1 Trade Cas. (CCH) para. 62,450.

for a writ of certiorari to and including December 14, 1979. The petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

In 1972, petitioner, the nation's second largest producer of recycled lead, acquired all of the stock of the fifth largest producer. The questions presented are:

1. Whether substantial evidence supports the Federal Trade Commission's finding that the continental United States is the relevant geographic market in which to assess the competitive impact of the acquisition under Section 7 of the Clayton Act.

2. Whether the record supports the Commission's determination that petitioner's attempted showing of anticipated technological changes in the industry failed to rebut substantial evidence that the effect of the acquisition may be substantially to lessen competition.

STATUTORY PROVISION INVOLVED

The pertinent portion of Section 7 of the Clayton Act, 15 U.S.C. 18, is set forth at Pet. 3.

STATEMENT

1. Petitioner RSR Corporation and Quemetco, Inc., are producers of "secondary" or recycled lead, *i.e.*, lead produced by the smelting and refining of scrap materials containing lead such as discarded lead-acid batteries. Their product differs from "primary lead," which is

obtained directly from lead ores. Battery manufacturers are the major purchasers of secondary lead (Pet. App. 4a, 35a).[2]

In 1972, RSR acquired all of the stock of Quemetco. At that time RSR and Quemetco were, respectively, the second largest and the fifth largest producers of secondary lead in the United States. RSR accounted for 10.22% and 12.16% of shipments in the United States in 1971 and 1972 (Pet. App. 120a). It operated two lead recycling plants, one in Newark, New Jersey, and another in Dallas, Texas. RSR was planning to build a replacement smelter in the East for its Newark plant when the possibility of acquiring Quemetco arose (Pet. App. 121a).

Quemetco accounted for 6.63% and 7.02% of the secondary lead shipments in the United States in 1971 and 1972. It operated three lead recycling plants located in the City of Industry, California; Seattle, Washington; and Indianapolis, Indiana. It was also in the final stages of testing a fourth plant at Wallkill, New York, which began commercial operations less than a month after the acquisition (Pet. App. 11a, 120a-121a).

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[2]Two types of lead are used in the manufacture of batteries. "Soft" or pure lead is used to make oxide, which is an active material in batteries. Antimonial lead (which is a "hard" or alloyed lead) is used in the structural parts of batteries, *e.g.*, the grids and posts (Pet. App. 39a). Battery manufacturers obtain soft lead mainly from primary-lead suppliers. They obtain nearly all antimonial lead from secondary-lead companies. Most of the output of secondary smelters is eventually used for the production of battery grids and posts (Pet. App. 25a, 30a-31a).

The court of appeals sustained the Commission's finding that the production and sale of secondary lead is a relevant product "submarket" for purposes of this proceeding (Pet. App. 175a-179a). RSR does not challenge that finding.

2. In 1974, the Commission issued an administrative complaint alleging that the acquisition would substantially lessen competition in the national markets for all lead and secondary lead. Following evidentiary hearings, an administrative law judge held that the acquisition violated Section 7 of the Clayton Act, 15 U.S.C. 18, in the national market for secondary lead. His finding of a national market was based principally on the fact that the leading firm in the industry, NL Industries, Inc., sold secondary lead on a nation-wide basis and that an important purpose of RSR's acquisition of Quemetco was to obtain the multi-plant capability to become a national firm (Pet. App. 103a-105a). With respect to relief, however, the administrative law judge recommended that RSR be required to divest only one of Quemetco's four plants—the Indianapolis smelter—on the ground that the sales overlap between the merged firms was limited to the Midwest and that the Indianapolis plant accounted for the bulk of Quemetco's overlapping sales with RSR (Pet. App. 112a).

3. On review, the Commission affirmed the ALJ's finding that the acquisition violated Section 7 of the Clayton Act in the national market for secondary lead. However, in finding the nation to be an appropriate geographic market, the Commission provided reasons in addition to those cited by the ALJ. Based on its analysis of shipping data in the record, the Commission found that, although secondary lead producers generally prefer to sell within a radius of a few hundred miles of their plants, the distance that secondary lead is shipped varies substantially according to economic and market conditions, plant location and size, secondary lead prices, and transportation costs (Pet. App. 132a-133a, 136a, 138a). Plants of both RSR and Quemetco had the

capacity to and often did sell in far distant areas. Thus, in 1972 RSR's Dallas plant shipped over 11% of its secondary lead more than 900 miles and 6% more than 1500 miles to customers on the East Coast. Similarly, Quemetco's Seattle smelter shipped 17% of its output over distances of more than 1100 miles (*id.* at 161a).[3]

Taking into consideration the area to be served by Quemetco's Wallkill, New York, plant, which commenced commercial operations within a month of the acquisition and previously had begun to solicit orders, the Commission found that the states in which Quemetco made or solicited sales accounted for 70% of the total U.S. lead consumption. Similarly, RSR made sales in states whose consumption represented 80% of the U.S. total (Pet. App. 134a-135a). The Commission also cited comparable statistics on consumption of antimonial lead, the most important type of secondary lead.[4]

In delineating a national geographical market in secondary lead, the Commission also relied on evidence showing the existence of nation-wide pricing interdependence in secondary lead—that is, evidence showing that price changes in one region affect prices throughout the country (Pet. App. 136a-138a).

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[3]The average shipping distance for the RSR Dallas plant was 410 miles; the average shipping distance for the Quemetco Seattle plant was 554 miles (Pet. App. 160a).

Data cited in the text and in this footnote cover the first ten months of 1972 and exclude intracompany shipments (Pet. App. 158a-159a).

[4]Thus, the 13 states surrounding Quemetco's four plants accounted for 59% of national consumption of antimonial lead in 1972. RSR shipped lead to states accounting for over 70% of antimonial lead consumption in 1971 (Pet. App. 135a).

Within this nation-wide geographic market, the Commission analyzed the probable competitive impact of the acquisition. The Commission found that a prima facie violation of Section 7 was shown by the fact that the secondary lead market is already highly concentrated and that the present acquisition, which combined the second and fifth largest firms in the nation, substantially increased concentration. Thus, the acquisition increased the four-firm concentration in shipments of secondary lead from 65.4% to 72.4% (Pet. App. 141a). The Commission pointed out that these figures in fact understate the actual increase in concentration resulting from the merger because Quemetco's productive capacity was about to increase substantially by virtue of its newly built plant in Wallkill, New York (Pet. App. 141a).

The Commission explained that the likely anticompetitive effects of the acquisition did not rest solely on presumptions derived from market shares and concentration ratios. The Commission cited record evidence showing that the acquisition was followed by the exaction of more restrictive contractual conditions from certain customers of both RSR and Quemetco—conditions that had not previously been imposed (Pet. App. 92a-93a, 142a-143a). The Commission also found that barriers to new entry in the industry resulting from high start-up costs are substantial and recently had been increasing due to the need for expensive equipment to meet environmental and occupational health and safety standards, requirements that already have hastened the exit of some smaller firms from the industry (Pet. App. 76a-77a, 144a).

The Commission also carefully evaluated the contention of RSR that the advent of "maintenance-free" batteries, which utilize calcium lead rather than antimonial lead, threatens the commercial viability of the

secondary lead industry. The Commission found that expert opinion was inconclusive on whether and to what extent such batteries would displace antimonial batteries in the foreseeable future (Pet. App. 149a). The Commission also pointed out that "[e]ven granting some of this speculation, widespread production of maintenance-free batteries will not necessarily destroy the secondary lead industry as it is presently constituted" (*id.* at 149a-150a). The Commission explained that it is as likely as not that the same recycling process would apply to calcium batteries and antimonial batteries (Pet. App. 150a).

The Commission disagreed with the administrative law judge's recommendation that only the Indianapolis plant should be divested. That recommendation was based on the view that the anticompetitive effects of the merger were limited to the Midwest region. The Commission found, however, that but for the merger the two firms would have been direct competitors in the Northeast as well—Quemetco through its new Wallkill plant in New York and RSR through the successor to its Newark plant that it planned to build before the acquisition occurred (Pet. App. 146a, 152a). These two areas accounted for over 50% of the nation's antimonial lead consumption (*id.* at 147a). Moreover, since the record clearly showed that prices in one region directly affected prices elsewhere, the Commission found that the acquisition had probable anticompetitive effects beyond the area of immediate overlap in the Midwest and Northeast (*id.* at 145a, 147a).

Concluding that divestiture of a multi-plant operation similar to that which RSR had acquired was necessary to restore the competitive condition that existed prior to the merger, the Commission ordered RSR to divest within one year all Quemetco plants except the Seattle plant,

thus leaving RSR with two plants (Dallas and Seattle) and Quemetco with three plants (Wallkill, Indianapolis, and Industry). The Commission pointed out that the reconstituted firms would be direct competitors in most areas of the country. It also noted the possibility of additional competition in the East where RSR had been planning to build a new plant (to replace its Newark plant) before it acquired Quemetco (*id.* at 157a, 166a-170a).

4. On RSR's petition for review, the court of appeals affirmed the Commission's order (Pet. App. 189a).[5]

The court held that the record fully supported the Commission's finding of a national geographic market. It cited substantial evidence proving (1) the ability of leading secondary-lead producers to ship lead into states in which most of the product is consumed, (2) preexisting competition between RSR and Quemetco in

[5]The court's opinion, as officially reported (602 F. 2d 1317), superseded an earlier opinion (1979-1 Trade Cas. (CCH)) para. 62,450. The only change in the opinion was with respect to the basis upon which the court distinguished *United States* v. *Marine Bancorporation, Inc.*, 418 U.S. 602 (1974), and *United States* v. *Connecticut National Bank*, 418 U.S. 656 (1974), decisions on which petitioner RSR had relied in arguing that the Commission's geographic market delineation was incorrect.

In its original opinion the court distinguished the decisions on two grounds: (1) "Those cases involved the heavily-regulated banking industry, a fact upon which the [Supreme Court] strongly relied in holding that the relevant geographic market was only that area in which the regulatory agencies permitted the banks to provide service;" and (2) "Moreover, those cases involved *potential* competition, not *actual* competition, as in the instant case." 1979-1 Trade Cas. at 76,666 (emphasis in original). In its substituted opinion the court deleted the second ground and expanded a subsequent sentence to read: "Because the locality of the competition was regulated, these cases are factually distinguishable from the situation before this court where unregulated market forces and other economic considerations determine the region where competition in fact occurs" (Pet. App. 183a).

the Midwest[6] and imminent competition between them in the Northeast when the merger occurred, and (3) nationwide pricing interdependence (Pet. App. 182a-183a).

The court also sustained the Commission's determination that the effect of the acquisition may be substantially to lessen competition in violation of Section 7 of the Clayton Act. It held that under this Court's decisions (including *United States* v. *Philadelphia National Bank*, 374 U.S. 321 (1963); *United States* v. *Pabst Brewing Co.*, 384 U.S. 546 (1966); and *United States* v. *Von's Grocery Co.*, 384 U.S. 270 (1966)) the market share and concentration figures were sufficiently high to support a finding of violation. The court added that "[m]oreover * * * [the Commission's] finding of anticompetitive effect is supported by evidence that the merged RSR extracted more favorable terms in the marketplace than were obtained by the separate companies before the merger" (Pet. App. 185a). The court also held that the Commission was not required to accept RSR's contentions that other considerations and evidence outweighed the evidence of anticompetitive impact (*id.* at 185a-187a).

ARGUMENT

1. The Commission and the court of appeals correctly held that relevant geographic markets in Section 7 cases must be defined in practical terms in light of the competitive situation of the merging firms and the economic forces at work in their industry. "Congress prescribed a pragmatic, factual approach to the definition of the relevant market and not a formal, legalistic

[6]The court noted that many major battery manufacturers (the primary consumers of antimonial lead) are concentrated in the Midwest (Pet. App. 182a).

one," which means that geographic markets must "correspond to the commercial realities of the industry" in question. *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 336-337 (1962) (internal quotations omitted). Cf. *United States* v. *Continental Can Co.*, 378 U.S. 441, 449 (1964) (prior product-market guidelines enunciated by the Court "offer no precise formula for judgment and they necessitate, rather than avoid, careful consideration based upon the entire record").

Applying these principles, the Commission found that in the secondary lead market, "[w]hile shipping costs place a constraint on the distance to which individual plants are likely to send their product, the constraint is only relative, and individual smelters can and do frequently ship their product into regions far distant from their plants, a factor which, combined with the presence of only a few major customers, creates a substantial measure of regional interdependence" (Pet. App. 138a-139a). As the court of appeals explained, the evidence introduced in the present case proved "that when one region discounts the price of secondary lead, the price is eventually affected nationwide. If prices are higher in one area, producers are willing to ship greater distances to get their product into that area. In turn, the price offered in other areas will rise so that consumers there will be assured of a supply of secondary lead" (Pet. App. 182a, n.3).[7] In simple terms, the geographical area

[7]Economists often define a geographic market as "the area within which the price of a commodity tends to uniformity," allowance being made for differing transportation costs. G. Stigler, *The Theory of Price* 85 (3d ed. 1966). See also 2 P. Areeda & D. Turner, *Antitrust Law* 355 (1978) ("when prices and price movement in two territories are closely correlated, a single market definition is strongly indicated"); *United States* v. *Bethlehem Steel Corp.*, 168 F. Supp. 576, 599-600 (S.D. N.Y. 1958).

in which competition between secondary lead producers has a tangible effect on price, and where the break-down of competitive conditions would be directly felt, is the continental United States.

RSR disputes this conclusion by referring (Pet. 7-8) to the administrative law judge's finding that nearly all of Quemetco's sales in 1971-1972 were made in 11 states surrounding its plants while RSR made most of its sales in 13 states, and that customers in only seven states received shipments from both RSR and Quemetco during this period. However, the Commission properly noted that "[t]hese figures * * * tell only part of the story" because they fail to include the new Wallkill plant, for which Quemetco was actively soliciting customers at the time of the merger (Pet. App. 134a).[8] Including the areas intended to be served by the new plant, the Commission found that the total number of states served by Quemetco represented 70% of total United States lead consumption. By comparison, the states in which RSR made sales represented 80% of total United States lead consumption (Pet. App. 134a-135a). It was on the basis of this evidence that RSR and Quemetco served the nation's largest lead consuming regions, coupled with proof of nation-wide pricing interdependence and direct competition between RSR and Quemetco in major-lead consuming states, that the court of appeals upheld the Commission's finding that both companies were active participants in a nation-wide geographical market (Pet. App. 180a).

[8]Since the Wallkill plant was about to commence operations when the acquisition occurred and was actively soliciting business, the Commission was justified in considering it as effectively present in the market for purposes of this case. See *United States* v. *El Paso National Gas Co.*, 376 U.S. 651 (1964), construed in *Marine Bancorporation, Inc. supra*, 418 U.S. at 623-624, n.24

To be sure, there are areas of the country in which the merging firms did not compete or do business. But as the court of appeals observed, "the fact that RSR and Quemetco did not compete in every state is of little significance when many states generate little or no demand for secondary lead" (Pet. App. 182a). Congress did not intend to require delineation of the affected market area by "metes and bounds as a surveyor would lay off a plot of ground." *United States* v. *Pabst Brewing Co.*, 384 U.S. 546, 549 (1966). And as the court of appeals pointedly observed, RSR has never suggested an alternative market definition (Pet. App. 180a).

The result reached by the Commission and sustained by the court of appeals is not contrary to the standard for market definition applied in *United States* v. *Marine Bancorporation, Inc.*, 418 U.S. 602 (1974), and *United States* v. *Connecticut National Bank*, 418 U.S. 656 (1974). The language and the context of the sentence from *Marine Bancorporation* on which RSR relies (Pet. 6, 8) show that the Court did not purport to establish a rigid mechanical test for defining geographic markets in every Section 7 case in every industry.

Marine Bancorporation did not involve a dispute over the relevant market. That case concerned a proposed merger of a large bank located in Seattle, Washington, and a small bank located in Spokane, Washington. The banks were "not direct competitors to any significant degree in Spokane or any other part of the state" (418 U.S. at 605). The government agreed that Spokane was the only relevant banking market in the case (*id.* at 619-620). It based its claim that the acquisition violated Section 7 on the theory that elimination of the Seattle bank as a potential entrant into Spokane lessened competition in that market and in the state as a whole.

The government "conceded that the State is not a banking market" (*id.* at 620), but nonetheless argued that the entire state was a relevant "section of the country" within the meaning of Section 7.[9]

The Court rejected the government's analysis. It summed up its reasons in the sentence on which petitioner relies (Pet. 6, 8): "Without exception this Court has treated 'section of the country' and 'relevant geographic market' as identical, and it has defined the latter concept as the area in which the goods or services at issue are marketed to a significant degree by the acquired firm" (418 U.S. at 620-621).

In *Marine Bancorporation* and *Connecticut Bank*, the Court's discussion focused on the government's novel "section of the country" argument. The first clause of the above-quoted sentence summarized the unvarying line of authority equating "section of the country" and geographic market.[10] The second clause, which is independent of the first, described a criterion for identifying geographic markets often applied in merger cases, and always applied in the banking industry. Thus, in *Connecticut National Bank*, the Court held that the

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[9]It reasoned that the challenged acquisition could trigger other bank mergers and lead eventually to the domination of all banking in the state by a few large banks linked with each other in a network of local oligopolistic markets (*id.* at 620).

[10]In the present case, the challenged acquisition was analyzed in a geographic market defined in accordance with traditional economic principles. As the Commission expressly found, the merging companies both sold their products in the major lead consuming states, and the price that they received for their products depended on the competitive situation nationwide. In this national market, RSR and Quemetco were direct competitors, not potential competitors as in *Marine Bancorporation* and *Connecticut Bank*.

geographic market "must be defined in accordance with this Court's precedents in prior bank merger cases" and "* * * must be delineated in a way that takes into account the local nature of the demand for most bank services" (418 U.S. at 667, 668). Petitioner mistakes the descriptive language in the second clause for a universal standard for delineating geographical markets. It is not.[11] The Commission and the court of appeals correctly held that the Court's discussion in *Marine Bancorporation* was focused on the localized banking industry, whose members compete only within a narrow radius that is generally coextensive with their immediate customer service area (Pet. App. 139a n.16, 183a). In contrast to the situation in *Marine Bancorporation*, the Commission found that the merging firms involved here (as distinguished from their constituent plants) were actual competitors in a national market (cf. *United States* v. *Pabst Brewing Co.*, *supra*; *United States* v. *Marine Bancorporation, Inc.*, *supra*, 418 U.S. at 621, n.20). As the court of appeals held, this determination is supported by substantial evidence (Pet. App. 182a, 183a).

2. Petitioner also argues (Pet. 10-15) that the Commission and the court of appeals gave "decisive weight" to market share and concentration data for the years prior to the acquisition and that in so doing they departed from the teachings of this Court in *United States* v. *General Dynamics Corp.*, 415 U.S. 486 (1974).

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[11]Indeed, the Court noted in *Marine Bancorporation* that in potential competition cases, in which two firms form a joint venture to enter a new area, the relevant market in which the competitive effect of the combination must be assessed is an area where *neither* of the partners previously competed (*id.* at 621 n.19, citing *United States* v. *Penn-Olin Chemical Co.*, 378 U.S. 158 (1964)).

However, petitioner misconstrues this Court's decision in *General Dynamics* and fails to note that the decisions below did not rely exclusively on evidence of market shares and industry concentration.

In *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 363 (1963), this Court held that "a merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market, is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects." In sustaining the district court's ultimate conclusion in *General Dynamics* that the merger would not substantially lessen competition, this Court did not renounce, but on the contrary reaffirmed, the correctness of the analysis in *Philadelphia National Bank*.[12] The Court's decision was based primarily on the

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[12]After quoting the above language from *Philadelphia National Bank*, the Court explained in *General Dynamics* that (415 U.S. at 497):

> The effect of adopting this approach to a determination of a "substantial" lessening of competition is to allow the Government to rest its case on a showing of even small increases of market share or market concentration in those industries or markets where concentration is already great or has been recently increasing, since "if concentration is already great, the importance of preventing even slight increases in concentration and so preserving the possibility of eventual deconcentration is correspondingly great." *United States* v. *Aluminum Co. of America*, 377 U.S. 271, 279, citing *United States* v. *Philadelphia National Bank*, *supra*, at 336 n.42.

After its decision in *General Dynamics*, this Court has continued to apply the presumption rule of *Philadelphia National Bank*. See *United States* v. *Citizens & Southern National Bank*, 422 U.S. 86, 120 (1975); cf. *United States* v. *Marine Bancorporation, Inc.*, *supra*, 418 U.S. at 631-632.

defendant's showing that in the coal industry, unlike most other industries, statistical evidence of past production is not a reliable indicator of a firm's future competitive strength. The most significant fact, as the district court found on the basis of the record before it, was the coal producer's uncommitted reserves. Because its reserves were substantially depleted, the acquired company was found to be an insignificant future competitor (415 U.S. at 503).

In *General Dynamics*, past production figures did not accurately reflect the competitive strength of the acquired firm. In the present case, in contrast, the Commission found that the past shipments of Quemetco are not only a reliable index of its competitive strength, but actually understate its competitive potential because Quemetco was almost ready to start operating a large new smelter at the time of the merger (Pet. App. 141a). Moreover, the decisions of the Commission and the court of appeals did not rest solely on presumptions arising from market share and industry concentration statistics. Both decisions also relied on additional evidence showing substantial barriers to entry and the actual impact of the acquisition on customers (Pet. App. 142a-144a, 184a-185a).

The Commission and the court carefully evaluated RSR's arguments that the evidence of likely anti-competitive effect was rebutted by evidence concerning the invention of the "maintenance-free" battery. The Commission found that there was wide disagreement among members of the lead and battery industries concerning the extent to which calcium lead batteries would replace ordinary antimonial lead batteries. The Commission also noted that despite the commercial availability of calcium lead batteries for many years, the

record shows no clear trend or industry consensus about this product. Moreover, RSR's own in-house expert estimated that calcium lead batteries would account for only 20% of production in five years, and he rejected as "pure speculation" any attempt to make a more extended forecast (*id.* at 149a).[13] After a thorough review, the court of appeals affirmed the Commission's finding that RSR's arguments about the "maintenance-free" battery were entirely speculative and did not rebut evidence showing that the present merger between the second and fifth largest producers in the nation had a probable anticompetitive effect (Pet. App. 179a).

Because RSR's proffered evidence of the future market effects of maintenance-free batteries is, at best, inconclusive, there is no need for this Court to review its additional contention (Pet. 14-15) that the court of appeals erred in concluding that post-merger evidence is entitled to "extremely limited" weight (Pet. App. 179a).

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[13]In addition, the Commission found that widespread production of maintenance-free batteries would not necessarily undermine the economic viability of the secondary lead industry because secondary lead companies can and do produce calcium lead (Pet. App. 149a-150a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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